IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

**JUDGMENT**
IN
**S.B. Criminal Appeal No.1694/2002**

Ratan Lal S/o Shri Roop Ram ...Accused-Appellant
**Versus**
State of Rajasthan through Public Prosecutor
...Respondent

**Date of Judgment ::: March *29*,2006**

Present
**Hon'ble Mr. Justice Narendra Kumar Jain**

Shri Dharam Gopal Chaturvedi with
Shri Mukesh Sharma for the accused-appellant
Shri S.L. Songara, Amicus Curiae
Shri B.S. Chhaba, P.P., for the State

**By the Court**:-

This appeal, on behalf of accused Ratan Lal Son of Shri Roop Ram, is directed against the judgment and order dated 25.11.2002, passed by the Additional District & Sessions Judge, Lakshmangarh (Alwar), in Sessions Case No.99/2000, whereby he was convicted under Section 376 (2)(f) of the Indian Penal Code (for short, 'IPC') and sentenced to ten years rigorous imprisonment and a fine of Rs.5000/-; in default of payment of fine, to further undergo one year's additional rigorous imprisonment, for the charge that he committed forcefully sexual intercourse with a minor girl Sanju, aged about 4 years, on 9.8.2000.

Shri Dharam Gopal Chaturvedi, the learned counsel for the accused-appellant, contended that there is no substantive evidence in the present case about rape committed by the accused-appellant as neither the prosecutrix has been examined in the present case nor there is any eye witness thereto. He also contended that prosecutrix Sanju was not examined in spite of fact that after hearing the arguments from both the sides on 19.9.2002 and on fixing the case for orders on 20.9.2002, the Additional Public Prosecutor filed an application under Section 311 of the Code of Criminal Procedure (for short, 'Cr.P.C.'), to produce the prosecutrix Sanju. The trial court allowed the said application and vide its order dated 20.9.2002 granted an opportunity to the Additional Public Prosecutor, to produce the prosecutrix Sanju but still she was not examined, therefore, an adverse inference should be drawn against the prosecution.

The learned counsel for the accused-appellant also contended that as per the First Information Report (for short, 'FIR') there were two boys present at the place of occurrence with the prosecutrix but both were not examined. Both boys were eye-witnesses, as per F.I.R. but both were not examined by the prosecution for the reasons best known to them. He

also contended that as per the injury report (Exhibit P-21) of the prosecutrix, the hymen was found torn but there was no marks of any injury on the part of the body. He contended that mere rupture of hymen does not prove the case of rape against the accused-appellant and the opinion of rape given in Exhibit P-21, proved by PW-16 Dr. R.K. Mishra, cannot be treated as substantive evidence. This evidence could have been used as corroborative of a substantive evidence but in the present case there is no substantive evidence to prove the sexual intercourse committed by the accused with the prosecutrix, hence this report is of no help to the prosecution case and only on that basis it cannot be said that the accused-appellant committed an offence of sexual intercourse with the prosecutrix Sanju. He also contended that as per the medical report of the accused it is clear that there was no injury on the male organ of the accused whereas the accused was young boy of 17 to 18 years of age and it proves his innocence as it is not possible that any young person, who commits sexual intercourse with a girl of 4 years of age, is found uninjured on his penis, therefore, he contended that the accused-appellant has falsely been implicated in the present matter. He also contended that the underwear and the

frock of the prosecutrix were seized and sent to the Forensic Science Laboratory (for short, 'FSL') and as per its report (Exhibit P-20) no blood stains were found on both the articles, therefore, his contention is that the learned trial court has committed an illegality in convicting and sentencing the accused-appellant.

Shri S.L. Songara, the learned Amicus Curiae, contended that as per the medical report (Exhibit P-14) of the accused, the accused was below 18 years of age on the date of occurrence. Exhibit P-14 was proved by PW-12 Dr. Lalit Krishna Gotecha. Looking to his age, in the submission of the Amicus Curiae, the accused could not have been sentenced by the trial court and he should have been referred to the Juvenile Board as with effect from 1st April 2001 the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter shall be referred to as the 'Act of 2000') came into force.

The learned counsel for the accused-appellant lastly contended that the accused-appellant was arrested on 9.8.2000 itself and was sent to judicial custody on 14.8.2000 and since then he is in custody and, therefore, he has already undergone the sentence of imprisonment for about 5 years and 8 months,

therefore, looking to the tender age of the accused this court may reduce the sentence of imprisonment awarded by the trial court, to a period of sentence of imprisonment already undergone by the accused-appellant.

The learned Public Prosecutor, on the other hand, contended that the learned trial court has rightly convicted and sentenced the accused appellant and no interference is called for in the finding of the trial court by this Court.

I have considered the rival submissions and minutely scanned the impugned judgment and the record of the trial court.

In Madan Singh Vs. State of Rajasthan, RCC 2005 (1) 47, the Division Bench of this Court held that the accused was below 18 years of age on the date of occurrence and when the Act of 2000 came into force with effect from 1.4.2001 the criminal case against him was pending, therefore, it ought to have been disposed of in terms of the provisions of the Act of 2000 and the Rules framed thereunder. The Division Bench remitted the case back to the learned trial court to forward the accused-appellant to the juvenile Board to pass orders in view of Sections 15 and 16 of the Act of 2000 and the Rules framed thereunder.

The Constitution Bench of the Hon'ble Supreme Court in Pratap Singh Vs. State of Jharkhand & Another, 2005 Cr.L.R. (SC) 288, considered the question whether the Act of 2000 will be applicable in the case where proceeding is initiated under the Act of 1986 and pending on 1st April, 2001, the date when the Act of 2000 came into force. Their Lordships of the Apex Court held that the provisions of 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offence committed under the 1986 Act, provided that the person had not completed 18 years of age as on 1.4.2001.

The Division Bench of the Bombay High Court in Sunil Vs. State of Maharashtra, 2005 (2) Acquittal 608, considered the provisions of Sections 20 and 64 of the Act of 2000 and in the facts and circumstances of that case, where conviction by the trial court was recorded on 30.9.1995 and appeal was pending on 1st April, 2001 the date when Act of 2000 came into force, and considering the judgment of the Apex Court in Pratap Singh's case (supra), the Bombay High Court held that the relevant date of reckoning, whether a person was juvenile or not, would be the date of commission of offence, and denied the benefit of the Act of 2000 in the facts and circumstances of that

particular case and for the reason that the accused was indisputably not less than 18 years of age on 1st of April, 2001.

In Rahim Beg Vs. State of U.P., AIR 1973 SC 343 = 1972 CAR 248 (SC), the Hon'ble Apex Court considered the case relating to the offence under Section 376 IPC wherein the age of victim was only 12 years; therein their Lordships held that if there is no injury detected by the doctor on the male organ of the accused, the accused would thus point to their innocence. The Hon'ble Supreme Court observed as under:-

> “26. According to Dr. Katiyar, Medical Officer of District Jail Rae Bareli, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. The examination of the two accused by Dr. Katiyar was on August 5, 1969. The two accused, however, had been arrested, according to the prosecution, on the morning of August 4, 1969. No cogent explanation has been furnished as to why they were not seen thereafter got medically examined by the police.”

In Gopal @ Sukhpal Vs. State of Rajasthan,

1989 RCC 125, the Division Bench of this Court also considered the effect of absence of marks, signs or injuries on male organ of the accused, in that case, having committed offence of sexual intercourse with victim of 11 or 12 years of age at the time of incident, and in para no.18 of the judgment observed as under:-

> “18. ....The victim Kanchan was hardly 11 or 12 years in age at the time of incident. Looking to her tender age, it is expected there must have been marks or signs of struggle or scratches or injuries or laceration on the appellant's penis and other such similar marks suggesting his having the intercourse. ...”

In State of Karnataka Vs. Sureshbabu Puk Raj Porral, 1994 SCC (Cri) 435, their Lordships of the Hon'ble Supreme Court, while dealing with the case arising out of offence under Sections 376 and 366 IPC, considered the statement of prosecutrix and observed as under:-

> “7. ...In the cross-examination the defence tried to elicit from her as to what exactly the accused did to her in those places during night. She went on saying that the accused did something to her which he ought not to have done. She

> admitted that her statement was the same before the police also. The learned Single Judge of the High Court especially pointed out this aspect and observed that it is very difficult to infer that the accused had intercourse with her. Therefore, in the absence of some other evidence to support the prosecution case that the accused had intercourse with her, in our view, the High Court was not wrong in holding that the offence under Section 376 IPC is not made out. ...”

In Mahesh Singh Vs. State of Rajasthan, RCC 1988 (13) 198, the Single Bench of this Court considered the provisions of Section 118 of the Evidence Act, 1872, in regard to competence of witnesses to testify, and observed as under:-

> “14. As stated earlier, in the instant case, it does not appear from the order sheet as to whether Kumari Kusum has appeared before the Court or, whether her competence was adjudged by the Court or, whether Kumari Kusum was tested to give her statement and whether she was in a position to give statement or not. In the present case, there was an application having moved on behalf of the Assistant Public Prosecutor wherein it has been stated that the witness (Kusum) is not in a position to give her

statement. In these circumstances, the learned trial Court was not justified in observing in the impugned judgment that the witness was not competent to give her statement, because according to law, it was to be ascertained by the Court in a best way as it can whether from the extent of his intellectual capacity and understanding, Kumari Kusum was able to give a rational account of what she has seen or observed on the day of incident.

15. In the aforesaid test, the Court has to see whether the witness has intelligence enough to understand the import and significance of questions or to give rational answers. Admittedly, the Court has discretion to form its own opinion whether a child witness has sufficient understanding to be qualified as a witness. Such an opinion can only be formed after the Court so decides after making preliminary enquiry in the matter.

16. In view of the aforesaid circumstances, I am of the opinion that no sufficient reasons were given by the prosecution in not producing Kumari Kusum in court as witness. ...In the instant case, non-production of Kumari Kusum

> is a material defect in the prosecution case and because of this infirmity, it cannot be said that the charge is proved against the appellant."

The rape has been defined under Section 375 IPC that a man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six descriptions mentioned therein. If the prosecutrix is under 16 years of age then with or without her consent, it falls within the definition of rape and is punishable under Section 376 IPC. A person, who commits rape on a woman when she is under 12 years of age, is liable to be punished with a minimum sentence of 10 years under Section 376 (2)(f) of the IPC. The allegation against the accused-appellant in the present case is that he committed rape with prosecutrix Sanju, aged about 4 years, and the learned trial court has convicted and sentenced him under Section 376 (2)(f) IPC.

So far as submission of the learned counsel for the accused-appellant about the Act of 2000 is concerned, the controversy has already been resolved by the Constitution Bench of the Hon'ble Supreme Court in Pratap Singh's Case (supra) wherein their Lordships

held as under:-

> “37. The net result is:-
> (a) The reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the Court.
> (b) The 2004 Act would be applicable in a pending proceeding in any Court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.”

The Hon'ble Apex Court has held that 2004 Act would be applicable in a pending proceeding in any Court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001

In the present case the learned counsel for accused-appellant, Shri Dharam Gopal Chaturvedi, does not dispute that no proceeding under the Act, 1986 was pending against the accused-appellant and in view thereof it is clear that the accused-appellant is not entitled to the benefit of the Act, 2000. The learned trial court has also recorded a finding in para 30 of

the impugned judgment that the accused was 18 years of age, therefore, he is not entitled to the benefit of the Act, 2000.

It is also relevant to mention here that S.B. Criminal Miscellaneous (Suspension of Sentence) Application No.1905/2002 was filed by the accused-appellant in the present appeal no.1694/2002 and it was argued on 14.5.2003 that the accused-appellant could not have been sentenced to imprisonment in view of specific provisions of the Act, 2000. Thereon this Court vide order dated 14.5.2003 directed the trial court to hold an inquiry regarding the age of the accused-appellant on the date of alleged incident after giving him an opportunity of hearing as well as to the State and the complainant, and to submit its report. Following the directions of this Court, the learned trial court recorded the statements of Roop Ram, Gulab Chand and Ramji Lal and after considering the statements of the witnesses as well as the documents Exhibit A-1 to Exhibit A-2, vide its order dated 30.6.2003, recorded a specific finding that the accused-appellant, on the date of occurrence i.e. 9.8.2000, was 18 years and 10 months of age. In view of this specific finding in respect of the age of the accused-appellant, the accused-appellant is not

entitled to get the benefit under the provisions of the Act, 2000.

PW-1 Ramji Lal, the father of the prosecutrix Sanju, lodged a typed report on 9.8.2000 that his daughter Sanju was in the agriculture field along with two children and the accused came there and caught hold of his daughter and thereafter the accused committed rape with his daughter. It was also alleged that on hearing hue and cry, Ganga Sahai came but on seeing him the accused ran away. Ganga Sahai brought his daughter. It was also mentioned that Madan Jatav also saw the accused when he was running. PW-1 Ramji Lal, in his statement before the Court, stated that Ganga Sahai heard hue and cry of children and at that time Madan Lal also came there and they saw that Sanju was weeping and accused Ratan Lal was running therefrom. He also stated that clothes of Sanju were stained with blood. On asking, his daughter told that a sexual intercourse was committed with her by accused Ratan Lal.

PW-2 Mst. Pyari, the mother of the prosecutrix, also stated that, on asking, her daughter told her that Ratan Lal committed sexual intercourse with her. She also stated that Ganga Sahai told her that he saw Ratan Lal running towards the village.

From the statement of PW-1 Ramji Lal and PW-2 Mst. Pyari, the parents of the prosecutrix, it is clear that they are not the eye witnesses to the incident and as per their statement Ganga Sahai and Madan Lal are the eye witnesses.

PW-4 Ganga Sahai, in his statement, stated before the court that he heard hue and cry in the field of Ramji Lal and when he reached there he saw that Sanju was weeping and blood was coming from her vagina. Accused Ratan Lal had gone from there. However, from his statement it is clear that he did not see the accused committing sexual intercourse with Sanju.

PW-3 Madan Lal also stated that Sanju was weeping and two sons of Udai Ram were also present there. He went where the children were standing and at that time Ganga Sahai also came. The blood was coming from the vagina of Sanju. He specifically stated that he did not see any one there. Subsequently he stated that he saw that Ratan Lal was running from the field of Ramji Lal. However, PW-3 Madan Lal was declared hostile by the prosecution.

From the above prosecution evidence it is revealed that PW-1 Ramji Lal, PW-2 Mst. Pyari, PW-3 Madan Lal and PW-4 Ganga Sahai were not witnesses to

the incident. However, from the statements of PW-1 Ramji Lal and PW-2 Mst. Pyari, it appears that Sanju was in a position to narrate the entire story as they have specifically stated that Sanju told them about penetration in her vagina meaning thereby a sexual intercourse was committed by accused Ratan Lal with her. If this was the position of Sanju about her understanding, then there was no reason for the prosecution not to examine her in support of its case, as she could be the best evidence in the present case. There is no evidence on the record to show that the prosecutrix Sanju was not competent to give her statement whereas from the statement of PW-1 Ramji Lal and PW-2 Mst. Pyari it is clear that she was fully competent to give her statement. It was the duty of the prosecution to produce Sanju as a witness and also it was the duty of the trial court to put her certain question to ascertain whether she was competent to give her statement, or not. In this connection the reference of Section 118 of the Evidence Act may be made, which prescribes that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease,

whether of body or mind, or any other cause of the same kind.

This Court in Mahesh Singh's Case (supra) considered the provisions of Section 118 of the Indian Evidence Act and held that non-production of Kumari Kusum is a material defect in the prosecution case and because of this infirmity, it cannot be said that the charge is proved against the appellant.

From the statements of PW-1 Ramji Lal and PW-2 Mst. Pyari, it is clear that Sanju was competent to testify. The learned trial court has not recorded any finding that the prosecutrix Sanju was not competent to testify from giving rational answers to the questions as she was not produced before the court. The trial court heard the final arguments on 19.9.2002 in the case and fixed 20.9.2002 for orders but on 20.9.2002 the Additional Public Prosecutor moved an application under Section 311 Cr.P.C. seeking permission to produce the prosecutrix Sanju in support of the prosecution case and the application of the Additional Public Prosecutor was allowed and he was given an opportunity to examine Sanju on 1.10.2002 but on that date in spite of giving opportunity the prosecution did not produce her to be examined. This leads an adverse inference against the prosecution. It

also creates serious doubt on the prosecution story that either the statements of PW-1 Ramji Lal and PW-2 Mst. Pyari are not reliable wherein they have stated that prosecutrix Sanju told them about commitment of sexual intercourse by the accused with her or that in case she would have been produced in the case then the charge could not have been proved against the accused-appellant by best evidence.

So far as medical evidence available in the present case is concerned, there is evidence that the hymen of prosecutrix Sanju was torn but whether only on that basis can it be said that it was because of sexual intercourse or it can be because of other reasons also. PW-16 Dr. R.K. Mishra, in his cross-examination, has admitted that hymen can be ruptured for other reasons viz. jumping or playing. The medical evidence in the present case is contradictory on the point that rupture of hymen can only be due to sexual intercourse or it can be for other reasons also. However, this medical evidence cannot be said to be conclusive evidence to prove a case of rape but it can be used only as corroborative evidence to prove the substantive evidence in the present case. As stated above, the substantive evidence in the present case is missing and the prosecution has failed to prove the

offence against the accused beyond reasonable doubt and thus the accused-appellant is entitled to get the benefit of it.

Apart from the above, it is also clear from the FSL report (Exhibit P-20) that blood could not be detected on Exhibits 3 and 4 i.e. underwear and frock of the prosecutrix, which were seized in the present case by the prosecution, therefore, there is a missing of link evidence also in the present case.

Although this is a case wherein there is an allegation against accused-appellant about committing rape with a minor girl of aged about 4 years but at the same time the court is expected to see the legal evidence also against the accused to connect him with the crime. There is no eye witness in the present case except prosecutrix Sanju, who has not been examined for the reasons best known to the prosecution despite the fact that on the application under Section 311 Cr.P.C. moved on behalf of the prosecution the court granted an opportunity to produce the prosecutrix in support of the prosecution case but still she was not produced. From the statements of PW-1 Ramji Lal and PW-2 Mst. Pyari, the parents of prosecutrix Sanju, it is clear that she was competent to understand the questions if put to her and give rational answers to

those questions. The best evidence in the present case was not produced by the prosecution.

The statement of PW-4 Ganga Sahai could only be used as a corroborative evidence and his statement cannot be said to be a substantive piece of evidence for convicting the accused-appellant for the charge under Section 376 IPC.

As per the contents of the FIR it is clear that two boys were also present at the time of occurrence but both were not examined by the prosecution in support of its case and thereof no reasons have been given.

From the medical report of the accused, who was medically examined on the same day i.e. 9.8.2000, it is clear that there was no injury on the penis of the accused-appellant and as held by the Hon'ble Supreme Court in Rahim Beg's case (supra) that if a girl of 10 or 12 years, whose hymen is intact, is subjected to rape by a fully developed man, there are likely to be injury on the male organ of the accused. In absence of injuries on the male organ, the Hon'ble Supreme Court gave benefit of doubt to the accused. In the present case the age of the prosecutrix Sanju is said to be four years only whereas the accused was above 18 years of age, therefore, if there would have

been any sexual intercourse by the accused with the prosecutrix Sanju, there would have been every likelihood that the accused-appellant would have received injuries on his male organ.

The overall effect of the above discussion is that the trial court has committed a serious illegality in convicting the appellant as from the above evidence it is clear that the prosecution has failed to prove the case against the appellant beyond reasonable doubt and the appellant is entitled to get the benefit of it.

Consequently the appeal is allowed. The impugned judgment passed by the trial court is set aside. The appellant is acquitted. He is in custody and he may be set at liberty forthwith if his custody is not required in any other case.

**(Narendra Kumar Jain) J.**

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